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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 679

M. D. (DOC) BENNETT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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**PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT.**

To the Honorable Chief Justice and Associate
Justices of the Supreme Court
of the United States:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

1. A criminal Bill of Indictment was filed at the March Term Thereof, A. D. 1944, by the Assistant United States Attorney for the Eastern District of North Carolina, in the Fayetteville Division, charging in Five (5) Counts as follows: * * * (R. pp. 1-4).

2. Motion was made to quash the search warrant and to suppress the evidence obtained thereunder in due time. This motion was, by the Court, overruled, and thereafter on the trial of the action, objection was made to the offer by the Government of evidence obtained as a result of the search warrant. However, the Court admitted the evidence and the Defendant excepted (R. p. 11).

3. The Motions being denied, the Petitioner was found guilty by a jury of the crime charged (R. pp. 10-11), and was subsequently sentenced to Five (5) Years on Count One; One (1) Year on Count Two; One (1) Year on Count Three; One (1) Year on Count Four; Pay a fine of \$500.00 on Count Five. Prison sentences in Counts Two, Three and Four to run concurrently with sentence in Count One and to stand commuted until payment of said fine (R. pp. 10-11).

4. An appeal from this judgment was taken to the Circuit Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court on October 16, 1944 (R. p. 14).

II.

QUESTIONS PRESENTED.

1. Whether or not a search warrant is valid, based upon an affidavit, which only sets forth that the affiant, an Investigator, Office of Price Administration, "has good reason to believe and does believe that in and upon certain premises within the Eastern District of North Carolina, to-wit, the premises known as the M. 'Doc' Bennett, Residence and place of business and particularly described as follows: * * * there have been and are now located and concealed certain property used as the means of committing a felony in violation of the Statutes of the United States,

to-wit: Ration order No. 3, Ration Order No. 5-C, under the Second War Powers Act. Section No. 100 and Section No. 72 under Title No. 18 of the United States Criminal Code. * * * (R. pp. 4-6)."

2. Whether or not a search is valid, based upon testimony and affidavit of the Investigator, set forth in the *search warrant itself*, as follows: "*he has reason to believe and does believe* that in and upon certain premises within the Eastern District of North Carolina, to-wit, the premises known as the M. (Doc) Bennett residence and place of business and more particularly described as follows: * * * *there is now located and concealed certain property used as the means of committing a felony*, in violation of a law or laws of the United States, to-wit: Ration Coupons, for Sugar, Gasoline, Shoes, Fuel Oil, the said coupons being concealed in, on or about said property, which coupons were not acquired by said M. "Doc" Bennett in a *lawful manner*, and upon *information and belief the affiant doth verily believe* that such Ration Coupons and Ration Evidences were acquired by M. "Doc" Bennett by *purloining* said property consisting of or acquiring said coupons and knowing them to have been stolen, or counterfeited, which offenses are considered a felony under Section #100 and #72 of title #18 of the United States Criminal Code, and is also a violation of Ration Order #5-C, under the Second War Powers Act."

The particular grounds for probable cause for the issuance of the search warrant consist of facts furnished by M. H. Eastburn, who testified under oath and made affidavit as follows:

"That Investigators for the Office of Price Administration had acquired information both Oral and written which indicates the said M. "Doc" Bennett had obtained and was selling and offering for sale certain

U. S. Gov't properties, known to have been stolen from the U. S. Gov't. to-wit: Ration Coupons.

"That the Investigators for the Office of Price Administration *had acquired information the said information both Oral and written* indicating that the said M. "Doc" Bennett *had acquired and was using* on his property certain plates, dies, impressions, presses, machines and devices for use in the making, printing, of counterfeit ration evidences, documents, coupons especially gasoline ration coupons and sugar ration coupons and certificates, in violation of Ration Order #3 and Ration order number #5-c, under the Second War Powers Act, and or in violation of sections #100, and section #72, of the U. S. Criminal Code (Title #18)." (R. pp. 6-8).

III.

STATUTES INVOLVED.

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Espionage Act, June 15, 1917, c. 30, Title XI, sec. 3, 40 Stat. 228; 18 U. S. C. A. 613:

"PROBABLE CAUSE AND AFFIDAVIT. A Search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Espionage Act, June 15, 1917, c. 30, Title XI, sec. 4, 40 Stat. 228; 18 U. S. C. A. 614:

"EXAMINATION OF APPLICANT AND WITNESSES. The judge or commissioner must, before issuing the war-

rant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Espionage Act, June 15, 1917, c. 30, Title XI, sec. 5, 40 Stat. 228; 18 U. S. C. A. 615:

"**AFFIDAVITS AND DEPOSITIONS.** The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Espionage Act, June 15, 1917, c. 30, Title XI, sec. 6, 40 Stat. 228; 18 U. S. C. A. 616:

"**ISSUE AND CONTENTS OF WARRANT.** If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

IV.

STATEMENT OF THE CASE.

On February 24, 1944, an investigator for the Office of Price Administration appeared before a United States Commissioner and applied for the issuance of a warrant authorizing a search of appellant's premises. The application was supported by the investigator's affidavit (R. pp. 4-6). On the basis of the affidavit and the oral testimony

of the investigator, the Commissioner issued a warrant authorizing a search of appellant's premises for certain property specified in the warrant, and also authorizing a seizure of the property (R. pp. 6-8). Pursuant to the warrant a search was made of appellant's premises and gasoline ration coupons and sugar ration coupons were seized (R. p. 9), however, no plates, dies, impressions, presses, machines or devices for use in the printing or making of counterfeit ration documents, coupons, certificates, especially Gasoline Ration Coupons, Sugar Ration Coupons and Sugar Certificates, were found upon the premises.

V.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals did not pass upon the first question (1) "whether the *affidavit* upon which the search warrant was issued *showed probable cause for the issuance of the search warrant*," but contented itself to pass upon the second question (2) "whether the *affidavit* upon which the search warrant was issued *was sufficient to justify the search for and seizure of the stolen and counterfeit ration coupons*." (R. pp. 15-16).
2. The failure of the Circuit Court of Appeals to pass upon the first question and its final judgment (R. pp. 15-16) denies unto the Petitioner the rights guaranteed under the Fourth Amendment to the Constitution of the United States.
3. The Circuit Court of Appeals, by its opinion (R. pp. 15-16), does not show that this *most vital question*, "*the sufficiency of the showing of probable cause in the affidavit*," as contended by the Petitioner (R. pp. 15-16), was considered by the Court, however, its affirmation of the ruling of the District Court on *this question* conflicts with

applicable decisions of this Court and more particularly as laid down in *Grau v. United States*, 287 U. S. 127, and is in conflict with the decisions of the Circuit Court of Appeals of the District of Columbia (*Schencks v. United States*, 2 Fed. (2nd) 186), the Circuit Court of Appeals for the Seventh Circuit (*Veeder v. United States*, 252 Fed. 414) and the Circuit Court of Appeals for the Eighth Circuit (*Wagner v. United States*, 8 Fed. (2nd) 581).

WHEREFORE, your Petitioner prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 5245, *M. D. (Doc) Bennett, Appellant, v. United States of America*, Appellee, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court as to Petitioner be reversed by this Honorable Court, and for such further relief as to this Court may seem proper.

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Dated November 15, 1944.



**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is printed on pages 15-16 of the record.

II.

JURISDICTION.

The character of the reasons for the Court reviewing this case on writ of certiorari falls largely within Rule 38, sub. paragraph 5 (b) of the Federal Court Rules, adopted by this Court, February 13th, 1939.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, Title 28 U. S. C., sec. 347 (a).

III.

STATEMENT OF THE CASE.

The facts in the case have already been related in the preceding petition under Title IV, supra, pages 5-6.

IV.

ARGUMENT.

A.

PROBABLE CAUSE.

The finding of *probable cause* by the commissioner or judicial officer to whom application for a search warrant is made *should be based, not on the opinion of witnesses, but on facts set forth in the affidavit*, from which the existence of probable cause may fairly be inferred. Otherwise the conclusion would be that of the witness, and not of the judicial officer in whom alone the Constitution has vested the extraordinary power to issue search warrants, and who is thus legally charged with the duty of preventing unreasonable searches and seizures. The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause, or there

should be a hearing by him with that in view. (Espionage Act, June 15, 1917, c. 30, Title XI, sec. 4, 40 Stat. 228; 18 U. S. C. D. 614) (*supra* Pet. 4-5). The immunity guaranteed by the Constitution should not be lightly set aside by a mere general declaration of a nonjudicial officer that he has reason to believe and does believe, etc. The undisclosed reason may fall far short of probable cause.

In *Veeder v. United States* (C. C. A.), 252 Fed. 414, Baker, C. J., speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

*** * * *No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs or surmises—but facts which, when the law is properly applied to them tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial question, and it cannot be delegated by the judge to the accuser."*

The only allegation in the affidavit in this case that the ration coupons, etc., which were discovered by the search (the only things the search disclosed) were on the premises is the statement "That he has good reason to believe and does believe that in and upon certain premises ***

there have been and are now located and concealed certain property used as the means of committing a felony in violation of the statutes of the United States, to-wit: Ration Order #3, Ration Order #5-C, under the Second War Powers Act, Section 100 and Section 72 under Title 18 of the U. S. Criminal Code." That this is insufficient was decided in Schencks v. United States (C. C. A., D. C.), 2 Fed. (2nd) 186, where it is said:

"A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. *If he has no first hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure,* the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statement made by him to the officer.

"Peace officers, to their credit be it said, zealously endeavor as a rule to bring law-breakers to justice, but unfortunately they are easily satisfied as to the guilt of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they *had reason to believe* and *did believe* that the law had been broken, or because they deposed that they *were informed and be-*

lieved that certain facts existed, would leave the home, the property, and the person of the citizen at *the mercy of mere suspicion*, and of misstatements, and mis-information for which no one could be held accountable.

* * *

"The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, * * * which fail to establish probable cause, inasmuch as they state the *facts on information and belief or state conclusions of fact or of law, instead of positively alleging material facts* (Italics ours).

Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152.

United States v. Ray (D. C.), 275 F. 1004-1006.
Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338.

Boyd v. United States, 116 U. S. 624-630, 6 S. Ct. 524, 29 L. Ed. 746.

"To hold otherwise would reduce search warrants to the status of the old writs of assistance, and would fritter away the rights guaranteed by the Fourth Amendment, thereby giving free rein to abuses, hateful to a form of government which is intolerant of the arbitrary and irresponsible exercise of power.

"We must hold, therefore, that affidavits or depositions which simply state that the affiant or dependent *has reason to believe and does believe* that a crime has been or is in course of being committed, or which go no further than to allege conclusions of law or of fact, or which set out on mere information and belief *the material facts on which the right to search or seize is based*, are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid." (Italics ours).

B.

(1) A SWORN COMPLAINT UPON WHICH A SEARCH WARRANT IS ISSUED UNDER THE PROVISIONS OF THE ESPIONAGE ACT (JUNE 15, 1917, C. 30, TITLE XI, SEC. 3, 40 STAT. 228; 18 U. S. C. A. 613) **MUST BE UPON PROBABLE CAUSE SUPPORTED BY AFFIDAVIT.** (*Supra*, Pet. p. 4).

(2) "**THE AFFIDAVIT OR DEPOSITIONS MUST SET FORTH FACTS TENDING TO ESTABLISH THE GROUNDS OF THE APPLICATION OR PROBABLE CAUSE FOR BELIEVING THAT THEY EXIST.**" (ESPIONAGE ACT, JUNE 15, 1917, C. 30, TITLE XI, SEC. 5, 40 STAT. 228; 18 U. S. C. A. 615) (*Supra*, Pet. p. 5).

(3) **A MERE ALLEGATION IN THE COMPLAINT OR AFFIDAVIT THAT THE AFFIANT "HAS GOOD REASON TO BELIEVE AND DOES BELIEVE . . ." IS NOT SUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE UPON WHICH A SEARCH WARRANT MAY ISSUE.**

The questions involved are so closely related and interlocked that they can best be argued as a single question.

Probable cause is a mixed question of law and fact. Whether the circumstances alleged to show that probable cause, or lack of probable cause, existed is a matter of fact; but whether supposing them true, the sufficiency of probable cause is a question of law. The magistrate cannot arbitrarily issue the warrant; he must require a *prima facie* case to be made out by some responsible person before he has any power to authorize invasion of private property.

C.

THE AFFIDAVITS AND TESTIMONY OF THE AFFIANT BEFORE THE COMMISSIONER WERE CONCLUSIONS OF FACTS BASED SOLELY UPON HEARSAY EVIDENCE AS TO THE PROPERTY TO BE SEIZED AND THE ACTS ALLEGED TO HAVE BEEN COMMITTED.

Nowhere in the affidavit is there a statement upon the personal knowledge of affiant that the ration coupons were concealed or were in anywise on the premises to be searched. There is no statement made upon the personal knowledge of affiant that the plates, dies, etc., were upon the premises (and none were found under the search warrant). The statement of the affiant "that the said M. "Doc" Bennett has knowledge and there is now concealed on his property, certain property, used as the means of committing a felony or fraud upon the Office of Price Administration, and against the peace and dignity of the United States by the use of this property, to-wit, plates, dies, etc.," is a mere conclusion of the affiant as was in *Wagner v. United States*, 8 Fed. (2nd) 581, where it is said: "In any event, the words quoted state not a fact, but a mere conclusion."

It is also noteworthy that in that case the affidavit was at variance with the search warrant.

"It is noted further that the affidavit alleges only the possession of intoxicating liquors while the search warrant goes further, and recites the manufacture, sale and concealment of intoxicating liquors; and the warrant also authorized the seizure of stills, mash and mash tubs no one of which was mentioned in the affidavit."

The affidavit in this case is similar to that in *In Re: No. 32 East 67th Street*, 96 Fed. (2nd) 153, in which the Court said the affidavit was insufficient to show facts upon

which to base a finding of probable cause. In that case the affidavit contained the following language:

"That in the course of his official duties he had learned that certain books, records, papers, and miscellaneous data used in connection with the above mentioned violation and certain dresses, garments, suits, hats, furs, gloves, labels and other women's wear and merchandise which were so smuggled into the United States were located in the five-story and basement building known as No. 32 East 67th Street."

In the case at bar it is to be noted that the affidavit contains language quite similar, to-wit:

"That the said M. Doc Bennett has knowledge and there is now concealed on his property * * * plates, dies, * * *."

The Court in disposing of the motion for the return of the property used this language:

"Relying upon the Fourth Amendment to the Constitution, the appellant contends that the search warrant was illegal because Pike's affidavit showed no facts upon which to base a finding of probable cause. Such generalities as appear in his affidavit were clearly no justification for issuance of the warrant."

D.

THE EVIDENCE BEFORE THE MAGISTRATE ISSUING THE WARRANT MUST BE COMPETENT AND MUST APPEAR IN THE SUPPORTING AFFIDAVITS.

This Honorable Court, in the case of *Grau v. United States*, 287 U. S. 124, 77 L. Ed. 68, 53 Sup. Ct. Rep. 38, decided (p. 40) that

"A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles v. United States* (C. C. A.), 284 F. 208; *Wagner v. United States* (C. C. A.), 8 F. (2d) 581), and would lead a man of prudence and caution to be-

lieve that the offense has been committed (*Steele v. United States*, 267 U. S. 498, 504; 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. * * *."

In *Nathanson v. United States*, 290 U. S. 41 (3rd Circuit), this Honorable Court, in reviewing a search warrant issued under a similar affidavit, at p. 46, said:

"Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmation of belief or suspicion is not enough."

In *Giles v. United States* (C. C. A.), 284 F. 208, (cited with approval by this Court in the Grau case supra), the Court said as follows (p. 214):

"No lawyer would have suggested and no judge would have permitted, Lordan, testifying as a witness before a jury, to say that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquor at his drug store. He would have been required to state what he saw, or heard, or smelled, or tasted; that is, to give evidence on which the jury, under instructions of the court, could determine both as to the possession of liquor, as to whether it was intoxicating liquor, and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not, in form, on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of the facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts,

and not his conclusion from the facts, should have been before the commissioner. Such is the plain requirement of section 5, supra."

In the instant case, the original affidavit, the testimony and the affidavit before the Commissioner incorporated in the search warrant itself were based solely upon information acquired both oral and written which indicates the said M. "Doc" Bennett had obtained and was selling and offering for sale U. S. Government properties known to have been stolen from the U. S. Government, etc., without disclosing the name or names of the informer or informers and as no witnesses or affidavits, in corroboration, were produced before the Commissioner in support of this purely hearsay evidence, as prescribed under the Espionage Act, June 15, 1917, sec. 4 (supra) (Supra, Pet. pp. 4-5), the search warrant should fall.

CONCLUSION.

Suffice to say, should the search warrant be held invalid, then it is inescapable that the conviction should be reversed on the Fourth Count of the Indictment as the proffer by the Government of the articles obtained under the search warrant before the jury were prejudicial to the Petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

—
No. 679

M. D. (Doc) BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 15-16)¹ is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 16, 1944 (R. 16). The petition for a writ of certiorari was filed November 15, 1944. The jurisdiction of this Court is in-

¹ References to the printed record are designated "R." References to the stenographic transcript of the record on appeal in the court below, which has been filed with the Clerk of this Court pursuant to stipulation (R. 18), are designated "Tr."

voked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the search warrant, pursuant to which petitioner's dwelling was searched and stolen and counterfeit ration coupons seized, was properly sustained as valid over petitioner's objection that there was not probable cause for its issuance, in that the affidavit pursuant to which it was issued was insufficient.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title XI of the Act of June 15, 1917, c. 30, 40 Stat. 217, 228-229, 18 U. S. C. 611-616, commonly known as the Espionage Act, contains, in pertinent part, the following provisions:

SEC. 2. A search warrant may be issued under this title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed * * *.

2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed * * *.

* * * * *

SEC. 3. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

SEC. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized

to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of North Carolina in five counts (R. 1-4), the first of which charged that on February 24, 1944, he unlawfully received, concealed, and retained in his possession, with intent to convert to his own use or gain, gasoline ration coupons, the property of the United States, which had been stolen, knowing the same to have been stolen, in violation of 18 U. S. C. 101 (R. 1-2).² Count two charged that on the same day petitioner unlawfully acquired and had in his possession counterfeit gasoline ration coupons, "in violation of Section 1394.8179 (e)³ of Ration Order No. 5C," issued pursuant

² Neither the sufficiency of the indictment nor the evidence are involved in this petition. However, for the convenience of the Court, we have set forth in the Appendix, pp. 15-17, *infra*, the provisions of law upon which the prosecution was based.

³ This is incorrect and should be Section 1394.8178 (e). Section 1394.8179 was revoked May 11, 1943 (8 F. R. 6181).

to the Second War Powers Act (R. 2). The third count alleged that on February 24, 1944, petitioner unlawfully acquired and possessed counterfeit sugar ration coupons in violation of Section 2.6 of General Ration Order No. 8 and Sugar Ration Order No. 3, issued pursuant to the Second War Powers Act (R. 3). Count four charged that on February 24, 1944, petitioner unlawfully accepted the transfer of, possessed and transferred to another counterfeit gasoline ration coupons in violation of Section 2.6 of General Order No. 8 and Section 1394.8178 (e) of Ration Order No. 5C, as amended, issued pursuant to the Second War Powers Act (R. 3-4). The fifth count alleged that in February 1944, petitioner unlawfully accepted the transfer of and had in his possession gasoline ration coupons unlawfully acquired by him, in violation of Section 1394.8177 of Ration Order No. 5C, amended, issued pursuant to the Second War Powers Act (R. 4).

Before trial petitioner moved to quash a search warrant which had issued to search certain premises occupied by him as a dwelling for stolen and counterfeit ration coupons, and for the return of ration coupons seized through the search (Tr. 5, R. 6-9). The motion was overruled and an exception noted (Tr. 5). At the trial the court permitted the Government to introduce the evidence which had been secured on the search of petitioner's dwelling (Tr. 24-28; Gov. Ex. A-C, Tr. 28), over pe-

tioner's objection that the evidence had been illegally obtained because the search warrant had not been issued upon probable cause in that the affidavit upon which the warrant was based did not show that the affiant had personal knowledge of the facts stated in the affidavit (Tr. 19).

At the trial the Government called as a witness an O. P. A. investigator, who testified that he had participated in the search of petitioner's home under the authority of the search warrant and had found concealed between the slats and mattress of a bed a quantity of ration coupons (Tr. 14, 24-27). Other Government witnesses testified that certain of these coupons were unissued coupons which had been removed without permission from an O. P. A. storeroom and that the other coupons were counterfeit (Tr. 29-31, 32-33).

The Government also introduced evidence not obtained through the search, which showed, in support of count four of the indictment, that petitioner had sold 96 counterfeit ration coupons (Tr. 33-34, 44-45). No testimony was offered by the defense (Tr. 45).

The jury returned a verdict of guilty on each count of the indictment (Tr. 52), and petitioner was sentenced to imprisonment for five years on the first count and for one year on each of the other counts except the fifth, the sentences on these counts to run concurrently with the sentence imposed on the first count (R. 9-11). A

fine of \$500 was imposed on count five (R. 10). On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed (R. 16).

ARGUMENT

Petitioner's sole contention (Pet. 9-17) is that the affidavit upon which the search warrant issued is insufficient because it does not set forth facts within the personal knowledge of the affiant to warrant a finding of probable cause. He claims that this defect exists both as to the conclusion in the affidavit that the ration coupons were on his premises (Pet. 10-11, 14) and as to the conclusion that he was guilty of the offenses alleged to have been committed (Pet. 14, 17). With respect to the location of the coupons on his premises, petitioner asserts that the only allegation in the affidavit to support the conclusion is the statement of the affiant "That he has good reason to believe and does believe" that the coupons were on the premises (Pet. 10).⁴ With respect to the commission of the offenses charged, petitioner urges that the search warrant itself shows that the finding of probable cause was based solely upon incompetent hearsay evidence (Pet. 14, 15-17).

The circuit court of appeals, in its *per curiam* opinion (R. 15-16), considered the sufficiency of

⁴ At page 14 of the petition, it is stated that "Nowhere in the affidavit is there a statement upon the personal knowledge of affiant that the ration coupons were concealed or were in anywise on the premises."

the affidavit upon which the search warrant was based solely with reference to its allegations in respect of the possession on the premises in question of counterfeit ration coupons. Since it held that the affidavit was sufficient in this aspect, it evidently deemed it unnecessary to pass upon its sufficiency with respect to the possession on the premises of stolen ration coupons. The court's opinion is short and hence we do not repeat the considerations upon which the court predicated its conclusion as to the sufficiency of the affidavit with reference to the counterfeit coupons. The affidavit was at least as adequate, if not more so, as to the stolen coupons.

The affidavit in question appears at R. 4-6, and is set forth in the footnote below.⁵ Admittedly, while, as the court below said (R. 15), "the affidavit was not skilfully drawn," we submit that, taken as a whole, it meets the tests as to adequacy enunciated by this and the lower federal courts.

⁵ On this 24th day of February, A. D. 1944, before me John S. Downing, a United States Commissioner in and for the Eastern District of North Carolina, personally appeared M. H. Eastburn, Investigator, Office of Price Administration, who being duly sworn, deposes and says:

That he has good reason to believe and does believe that in and upon certain premises within the Eastern District of North Carolina, to-wit, the premises known as the M. "Doc" Bennett, Residence and place of business and particularly described as follows:

One Bungalow type house, one frame Restaurant or tap
(frame)

It is true, of course, that under the Fourth Amendment and Title XI of the Espionage Act, pp. 2-4, *supra*, a search warrant may issue only upon probable cause, which has been defined by this Court as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with

room type building, one two story Garage or Barn and other small out buildings, located two and four-tenth ($2\frac{4}{10}$) miles in a southerly direction from Fayetteville, N. C. on Highway #301, the right-hand side traveling south. (above buildings painted white) there have been and are now located and concealed certain property used as the means of committing a felony in violation of the Statutes of the United States, to-wit: Ration order #3, Ration Order #5-C, under the Second War Powers Act. Section #100 and Section #72 under Title #18 of the United States Criminal Code.

That the facts tending to establish the grounds for this application and probable cause of affiants believing that such facts exist, are as follows:

That the said M. "Doc" Bennett has or had acquired, certain properties of the United States, to-wit: Ration Coupons, evidences, which evidence were known by said "Doc" Bennett to have been stolen from the United States Gov't. Further that the said M. "Doc" Bennett had sold and offered for sale the unlawfully obtained properties.

That the said M. "Doc" Bennett has knowledge and there is now concealed on his property, certain property, used as the means of committing a felony/or fraud upon the Office of Price Administration, and against the peace and dignity of the United States, by the use of this property to-wit: Plates, Dies, Impressions, Presses, Machines and devices for use in the printing or making of counterfeit ration documents, coupons, certificates, especially Gasoline Ration Coupons, Sugar Ration Coupons and Sugar Certificates.

which he is charged." *Stacey v. Emery*, 97 U. S. 642, 645; see also, *Dumbra v. United States*, 268 U. S. 435, 441; *Steele v. United States No. 1*, 267 U. S. 498, 504-505; *Carroll v. United States*, 267 U. S. 132, 161; *Shore v. United States*, 49 F. (2d) 519, 521 (App. D. C.). And probable cause cannot "rest upon mere affirmation of suspicion or belief without disclosure of supporting facts or circumstances." *Nathanson v. United States*, 290 U. S. 41, 47. Such facts or circumstances must be set forth under oath in affidavit form. See, 3-5, Title XI of the Espionage Act, pp. 3-4, *supra*. But applying these tests to the instant case, we think that there was an adequate showing made in the affidavit of probable cause for believing that petitioner had concealed on his premises stolen ration coupons which were being used by him as the means of committing the offense of possessing stolen government property in violation of 18 U. S. C. 101 (Appendix, p. 15, *infra*).⁶

⁶ It seems clear that the facts set forth purport to charge a violation of this section and not, as stated in the affidavit and warrant, of 18 U. S. C. 100, which punishes theft of United States property. However, the variance is immaterial. Thus, in *Ray v. United States*, 10 F. (2d) 359 (C. C. A. 6), the court held that a warrant authorizing a search for narcotics was not invalid because the warrant stated that the National Prohibition Act had been violated, where the statements in the warrant showed that the offense committed was a violation of the Harrison Narcotic Act. Also, it is settled that if a seizure is valid, the property may be used against a party in a prosecution for an offense not charged in the affidavit. *Gouled v. United States*, 255 U. S. 298, 311-

The affiant did not merely set forth his unsupported belief, but averred categorically, as the basis for his belief, (1) that petitioner had acquired ration coupons, (2) that petitioner knew these had been stolen from the Government, and (3) that he had sold and offered such coupons for sale. Furthermore, the affidavit also stated that petitioner had on his premises devices for the making of counterfeit coupons and, by fair inference, counterfeit coupons. These facts, taken in their entirety, were sufficient, we think, to warrant a "cautious man" in believing that probable cause existed, particularly in view of the principles that a finding of probable cause is not required to be supported by facts excluding every possibility that the offense had not been committed (*United States v. Lashomb*, 59 F. (2d) 809, 811 (N. D. N. Y.); *In re Kips Bay Brewing & Malting Co.*, 29 F. (2d) 836 (S. D. N. Y.), affirmed, 29 F. (2d) 837 (C. C. A. 2)) and that the evidence upon which probable cause rests need not be set out in detail (*In re Rosenwasser Bros.*, 254 Fed. 171, 173 (E. D. N. Y.).

312; Bookbinder v. United States, 287 Fed. 790, 796 (C. C. A. 3), certiorari denied, 262 U. S. 748.

¹ The cases cited by petitioner (Pet. 10-17) are distinguishable. All of them dealt with affidavits which were clearly insufficient, either because they alleged nothing more than the affiant's belief that the offense charged had been committed (*Nathanson v. United States*, 290 U. S. 41; *In re No. 32 East Sixty-Seventh Street*, 96 F. (2d) 153 (C. C. A. 2); *Giles v. United States*, 284 Fed. 208 (C. C. A. 1);

The second reason advanced by petitioner for the inadequacy of the showing of probable cause is that the record indicates that incompetent hearsay evidence alone was presented to the commissioner (Pet. 15-17). In this connection, placing his reliance on *Grau v. United States*, 287 U. S. 124, *Nathanson v. United States*, 290 U. S. 41, and *Giles v. United States*, 284 Fed. 208 (C. C. A. 1), petitioner argues (Pet. 17) that because "the original affidavit, the testimony and the affidavit before the Commissioner incorporated in the search warrant itself were based solely upon information acquired both *oral* and *written* which indicates the said M. 'Doc' Bennett had obtained and was selling and offering for sale U. S. Government properties known to have been stolen from the U. S. Government, etc., without disclosing the name or names of the informer or informers and as no witnesses or affidavits, in corroboration, were produced before the Commissioner in support of this purely hearsay evidence, as prescribed under the Espionage Act * * *, the search warrant should fall." (Italics as in the petition.) While, as we have indicated (fn. 7, starting at p. 11, *supra*), the cases cited by petitioner involved affidavits of a character much

Veeder v. United States, 252 Fed. 414 (C. C. A. 7)), or because the facts which were set forth did not fairly tend to establish a commission of the offense (*Grau v. United States*, 287 U. S. 124; *Schencks v. United States*, 2 F. (2d) 185 (App. D. C.)).

different than the affidavit in the instant case, this Court said in *Grau v. United States*, 287 U. S. at 128, from which petitioner quotes (Pet. 15-16), that not only must the evidence upon which a search warrant may issue have sufficient probative value with respect to the commission of the offense, but it also must be "competent in the trial of the offense." We submit that the record discloses that this rule has been satisfied. Since under the procedure prescribed by the statute, the judge or commissioner, before issuing a warrant, must examine the complainant on oath and require his affidavit or deposition in writing and cause it to be subscribed (Sec. 4 of the Espionage Act, p. 3, *supra*), and since it is the affidavit or deposition which must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist (Sec. 5, *ibid.*, p. 3, *supra*), determination of the question is necessarily dependent upon the contents of the affidavit, and not upon what the affiant may have testified to before the judge or commissioner. In the instant case, the affidavit does not state that the affiant merely had information as to the facts which he had obtained from other persons, but sets forth the facts directly as matters within the personal knowledge of the affiant. Consequently, this is not a case of a search warrant being issued upon hearsay evidence, as petitioner contends. While it may be that the affiant, in testifying before the

commissioner, gave in part hearsay evidence, this infirmity clearly does not attach to the affidavit, which, on its face, lends itself solely to the conclusion that the affiant had personal knowledge of the facts stated therein.

CONCLUSION

The case involves merely the application of well-established principles, and the court below correctly concluded that the affidavit was sufficient to support the search warrant. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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Solicitor General.

TOM C. CLARK,

Assistant Attorney General.

ROBERT S. ERDAHL,

LEON ULMAN,

Attorneys.

DECEMBER 1944.





APPENDIX

18 U. S. C. 101 provides as follows:

Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than \$5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

The Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. App. Supp. III, 631 *et seq.*), through which the Office of Price Administration acquired the authority to issue rationing orders, provides in part:

SEC. 2 (a) (5): Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

Subsection (a) of Section 1394.8177 of Ration Order 5C, the Gasoline Ration Order, issued by the Office of Price Administration (7 F. R. 9135, 9156), provides as follows:

No person shall transfer or assign any ration, and no person shall accept such transfer or assignment.

Subsection (c) of Section 1394.8178 of Ration Order 5C as amended (8 F. R. 16423) provides as follows:

No person shall transfer, receive a transfer of, possess, or use any forged, altered, or counterfeited folder, coupon book, gasoline deposit certificate, inventory, or other coupon or any other evidence.

Section 1407.202 of Ration Order No. 3, the Sugar Ration Order (9 F. R. 1433, 1450), provides as follows:

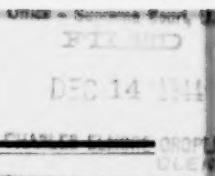
No person shall at any time either use or have in his possession or under his control or take delivery of any sugar, certificates, stamps or War Ration Books, where such possession, control, or acquisition is in violation of this order.

Sections 2.5 and 2.6 of General Ration Order No. 8 as amended (8 F. R. 3783, 8 F. R. 9626, 9 F. R. 1325) read as follows:

SECTION 2.5 Acquisition, use, transfer or possession of counterfeited or forged ration document. No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeit or forged.

SECTION 2.6 Acquisition, use, transfer or possession of ration document. No person shall acquire, use, permit the use of, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall transfer a ration document except in accordance with the provisions of a ration order.





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**PETITIONER'S REPLY BRIEF TO BRIEF FOR THE
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ARGUMENT.

The Argument advanced by the Government's Brief in opposition to the Petition for Writ of Certiorari is both specious and fallacious, for the following reasons:

- (1) The Government admits,

"While it may be that the affiant, in testifying before the commissioner, gave in part hearsay evidence,

this infirmity clearly does not attach to the affidavit (original) (ours), which, on its face, lends itself solely to the conclusion that the affiant had personal knowledge of the facts stated therein." (Government's Brief, pp. 13-14).

(2) The Government attempts to justify the *invalid search warrant*, as follows:

"Since under the procedure prescribed by the statute, the judge or commissioner, before issuing a warrant, must examine the complainant on oath and require his affidavit or deposition in writing and cause it to be subscribed (Sec. 4 of the Espionage Act, p. 3, *supra*), and since it is the affidavit or deposition which must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist (Sec. 5, *ibid.*, p. 3, *supra*), determination of the question is necessarily dependent upon the contents of the affidavit, and not upon what the affiant may have testified to before the judge or commissioner." (Government's Brief, p. 13).

This is a specious but fallacious interpretation of the intent and purpose of Sections 4 and 5 of the Espionage Act aforesaid, and it is not necessary for us to discuss the sufficiency or insufficiency of the (original) (ours) affidavit, *inasmuch as it was not incorporated in the search warrant*, in view of the mandatory provisions of Section 6 of the Espionage Act, as follows:

"ISSUE AND CONTENTS OF WARRANT. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular

grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner." (Petition p. 5).

The search warrant in the instant case (R. 6-8) falls clearly and unquestionably within the class condemned in

Veeder v. United States (C. C. A.), 252 Fed. 414
Giles v. United States (C. C. A.), 284 Fed. 208
United States v. Casino, 286 Fed. 976
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Most forcefully is presented the invalidity of the search warrant in Schencks v. United States (C. C. A., D. C.), 2 Fed. (2d) 185-187, where the Court said:

"A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. **If he has no first hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions.** In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the

judge or commissioner to give testimony as to the truth of the statement made by him to the officer.

"Peace officers, to their credit be it said, zealously endeavor as a rule to bring law-breakers to justice, but unfortunately they are easily satisfied as to the guilt of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they **had reason to believe** and **did believe** that the law had been broken, or because they deposed that they were **informed and believed** that certain facts existed, would leave the home, the property, and the person of the citizen at **the mercy of mere suspicion**, and of misstatements, and mis-information for which no one could be held accountable.

* * *

"The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, * * * which fail to establish probable cause, inasmuch as they state **the facts on information and belief or state conclusions of fact or of law, instead of positively alleging material facts** (Emphasis ours).

Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152.

United States v. Ray (D. C.), 275 F. 1004-1006.
Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338.

Boyd v. United States, 116 U. S. 624-630, 6 S. Ct. 524, 29 L. Ed. 746.

"To hold otherwise would reduce search warrants to the status of the old writs of assistance, and would fritter away the rights guaranteed by the Fourth Amendment, thereby giving free rein to abuses, hateful to a form of government which is intolerant of the arbitrary and irresponsible exercise of power.

"We must hold, therefore, that affidavits or depositions which simply state that the affiant or deponent **has reason to believe and does believe** that a crime

has been or is in course of being committed, or which go no further than to allege conclusions of law or of fact, or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid." (Emphasis ours).

CONCLUSION.

In the last analysis, it is the statement of the particular grounds or probable cause for its issue, set forth and incorporated in the search warrant itself, that determines or tests the validity or invalidity of the search warrant, and no ex parte affidavit can be invoked to bolster up any infirmity contained therein, by reason of the mandatory provisions of Section 6 of the Espionage Act, (supra). It is, therefore, contended that the search warrant was invalid, and the Government is estopped by its own admission, (Government's Brief, pp. 13-14), from urging further contention upon this Honorable Court, against the granting of the Writ.

Respectfully submitted,

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